No. 3960.

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the Matter of PATTERSON-MacDONALD SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

F. E. BURNS, W. C. DAWSON, JAMES FOWLER and JOHN L. McLEAN, as Trustee in Bankruptcy of PATTERSON-MacDonald SHIPBUILDING COMPANY, a Corporation, Bankrupt,

Respondents.

BRIEF OF PETITIONER
In Petition

Under Section 24b of the Bankruptcy Act of Congress Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the Western District of Washington, Northern Division

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On March 19, 1920, Patterson-MacDonald Shipbuilding Company was duly adjudged a bankrupt in the United States District Court for the Western District of Washington, Northern Division, upon its voluntary petition, the matter of said bank-

ruptcy was referred to the Honorable Cicero R. Hawkins as referee in bankruptcy, and the respondent John L. McLean was duly elected trustee of the said bankrupt. Thereafter Mark Sheldon, as Commissioner for the Commonwealth of Australia, for and on behalf of the petitioner filed with the said referee a claim of this petitioner in a sum in excess of $1,000,000, founded upon alleged breaches of a contract for the construction of ten ships. This contract provided in general terms for the arbitration of all differences which might arise between the parties, and a supplemental contract provided that a certain specific question should be submitted to the arbitration of the respondent James Fowler. The trustee filed objections to the claim of this petitioner, and thereupon on October 12, 1920, an order was entered in the said District Court in the said bankruptcy proceedings as follows, to-wit:

> "That C. R. Hawkins be and he hereby is appointed a special master in chancery to take evidence and make findings upon the questions arising out of the proof of secured claim filed by Mark Sheldon as Commissioner for the Commonwealth of Australia in the United States of America, and the objections thereto by the trustee in bankruptcy, and submit his findings and conclusions to this court in the same manner as if sitting as a referee in bankruptcy." (Record pp. 9, 10).

The said matter came on regularly for hearing before the special master, and, during the hearing,

the trustee instead of presenting to the special master his claim for offsets against the claim of this petitioner asserted the right to have such claim arbitrated pursuant to the terms of the contract, and thereupon appointed the respondent F. E. Burns to act as arbitrator for him, and the said respondent Burns in conjunction with one Frank Walker, acting as an arbitrator appointed by this petitioner appointed the said respondent W. E. Dawson, and the three arbitrators subsequently filed with the said special master a paper purporting to be an award finding in favor of the trustee in the sum of $1,028,458.66.

The most careful scrutiny of the record in this case will fail to disclose any one of the following facts: (a) either that the trustee was ever authorized by any order of the court to employ these arbitrators; or (b) that any issues either of fact or of law were ever agreed upon or made up by the parties to this so-called arbitration; or (c) that there was the slightest attempt to comply with any of the provisions of Rule 33 of the Bankruptcy Rules.

In spite of these deficiencies however the so-called awards of the arbitrators were received by the special master and their validity and effect are now questions pending on appeal in this court.

In the meantime, however, the respondents presented their bills for services to the trustee, the trustee recommended their payment at a meeting

of creditors, (Record pp. 11, 12) and over the objection of this petitioner these claims were ordered paid. (Record pp. 18-20). This petitioner thereupon filed its petition for review in the district court, (Record pp. 21-24) in which petition for review this petitioner claimed that the said ruling and order of the referee were erroneous for the following reasons:

1. That the said trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court.

2. No order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

3. The submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other court or board of arbitrators was contrary to the express directions contained in the above mentioned order appointing a special master to pass upon the said claim.

4. The awards of the said arbitrators are void upon their face.

5. The said arbitrators have rendered no beneficial service to the said trustee for the reason that the said awards have not yet been approved by this court, but will be found by this court upon objections which have been offered thereto by this petitioner to be void and of no force and effect.

Upon the hearing had, however, the District Court entered its order approving, confirming and sustaining the said order of the referee. (Record p. 25). To this order this petitioner took exception, and subsequently filed its petition for revision in this court.

Specifications of Error Relied Upon.

We respectfully submit that the order of the District Court was erroneous in the following particulars:

First: The court erred in not sustaining the objections of the petitioner to the order of the referee on the ground that the trustee had no power or authority to employ arbitrators without the express order and direction of the bankruptcy court.

Second: The court erred in not sustaining the objections of this petitioner to the order of the referee on the ground that no order of the bankruptcy court was ever entered authorizing the employment of any arbitrators or authorizing the trustee to submit any question to arbitration.

Third: The court erred in not sustaining the objections of this petitioner to the order of the referee on the ground that the submission by the trustee of any question relating to the liquidation of this petitioner's claim to any other court or board

of arbitrators was contrary to the express directions contained in the order of this court appointing a special master to pass upon the claim.

Fourth: The court erred in not sustaining the objections of this petitioner to the order of the referee on the ground that the awards of the arbitrators are void upon their face.

Fifth: The court erred in not sustaining the objection of this petitioner to the order of the referee on the ground that the arbitrators have rendered no beneficial service to the trustee.

Sixth: The court erred in approving the order of the referee ordering payment to F. E. Burns in the sum of $3000.00, and to W. C. Dawson in the sum of $1500.00, and to James Fowler in the sum of $500.00.

ARGUMENT.

All of our assignments of error in this proceeding may be consolidated into one proposition: that is, that the trustee in bankruptcy did not make any attempt to comply either with Section 26 of the Bankruptcy Act or Rule 33 of the Bankruptcy Rules, but, entirely of his own motion, attempted to appoint these arbitrators and thereby render the estate liable to compensate them for their services; and a trustee in bankruptcy is not empowered to do this.

We assume for the purpose of this proceeding that it is immaterial whether or not the award of the arbitrators was correct upon the merits, as it appears to be clearly the law, that the fact that the judgment of an arbitrator upon the merits is erroneous does not deprive him of his right to fees. We have therefore expressly omitted from this record all facts relative to the correctness or validity of this award as between the trustee and the claimant which is now on appeal in another proceeding and will be argued at the May term. We confine ourselves explicitly to the question: Is a trustee in bankruptcy authorized to employ arbitrators without a compliance with the Bankruptcy Act and rules relative thereto? We submit, however, that upon determining whether an arbitrator is entitled to his fees, the same rules of law apply as to any other contract of employment: that is to say, that where a public official or quasi-public official attempts to employ an individual to perform any services, an authority to effect such employment must exist as a necessary condition to the employee's right to recover compensation.

A trustee in bankruptcy receives his power from the Bankruptcy Act and from that act alone, so that before it can be determined that a trustee has power or authority to do any specific act, a provision of the Bankruptcy Act must be found conferring such power. The Bankruptcy Act establishes a court for the adjudication of claims against

the bankrupt and that court is the Federal District Court. Section 1 (7) of the Bankruptcy Act provides that "'the court' shall mean the court of bankruptcy in which the proceedings are pending and may include the referee."

It will thus be seen that the trustee has none of the power given to the court as a court, also that the bankruptcy act does not give any administrative powers to a special master as such. The entire administrative power vested in the court of bankruptcy as a court are to be exercised only by the judge or the referee acting as such, after the matter has been referred to him by the judge.

Section 2 (2) provides that courts of bankruptcy shall have jurisdiction to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."

Section 2 (7) provides that these courts shall have jurisdiction to "determine controversies in relation thereto, except as herein otherwise provided," and Section 2 (19), "to transfer cases to other courts of bankruptcy."

Section 55 (b) provides that "at the first meeting of creditors the judge or referee shall preside, and before proceeding with the other business may allow or disallow the claims of the creditors there presented."

Section 57 (d) provides that "claims which have been duly proved shall be allowed upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion."

Section 57 (f) provides that "objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit."

Section 57 (k) provides that "claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case before but not after the estate has been closed."

Section 58 (7) provides that creditors shall have statutory notice of "the proposed compromise of any controversy."

Section 63 (b) provides that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 25 provides for an appeal to the Circuit Court of Appeals "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

While to make sure that there can be no question as to the intent of the act, section 65 (c)

provides that "a claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this act."

It will thus be seen that the Bankruptcy Act gives exclusive jurisdiction to the District Court to adjudicate claims against the bankrupt and the jurisdiction of the District Court so to do is necessarily exclusive except as modified by any other provisions of the act.

Section 26 provides for arbitration under certain conditions. This section reads as follows:

> "(a) The trustee may, pursuant to the directions of the court, submit to arbitration any controversy arising in the settlement of the estate.
>
> (b) Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.
>
> (c) The written finding of the arbitrators or a majority of them, as to the issues presented, may be filed in court and shall have like force and effect as the verdict of a jury."

The method of obtaining the "direction of the court" in order to authorize a submission to arbitration is contained in Rule 33 of the Bankruptcy Rules which provides as follows:

> "Whenever a trustee shall make application to the court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject matter of the controversy, and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration, or otherwise."

These provisions clearly require that definite issues shall be made up between the trustee and his opponent, that these issues be presented to the court together with the reasons why it is for the interest of the estate that the controversy should be settled by arbitration, that a specific order of the court should be obtained settling the issues to be determined and authorizing the employment of arbitrators and that the proceedings had before the arbitrators and the award of the arbitrators should be in such form that the award should have the effect of a verdict of a jury: that is to say, it should be conclusive only as to questions of fact properly submitted to them under the contract of submission. It is not claimed by the respondent that this procedure was followed in any particular. The claim of the respondents is that the contract which formed the basis of the petitioner's claim provided for arbitration of all differences between

the parties and that the trustee in succeeding to the rights of the bankrupt under the contract also succeeded to the right and power of employing a court of his own choosing to adjudicate the differences arising between the parties to such contract.

The only provision of §26 of the Bankruptcy Act and Rule 33 of the Bankruptcy Rules which was complied with in connection with this so-called arbitration was the appointment of the magical number of three arbitrators and the manner of their appointment; but this fact happened, not because it was required by the Bankruptcy Act, but because it was required by the provisions of the contract in question. In other words, the trustee does not claim that his authority to employ arbitrators came from the Bankruptcy Act and a compliance therewith, but from a succession to the right of the bankrupt to set up a court of his own, and this was also the theory adopted by the referee.

There seems to be a general superstition that a trustee in bankruptcy "stands in the shoes of the bankrupt" in all particulars. This is true in many particulars but it is true only in cases where specific authority therefor is found in the Bankruptcy Act. For instance, the trustee takes the title of the bankrupt to all of the bankrupt's property but that is because §70 (a) so provides. The trustee may, *if authorized by the court,* take over pending executory contracts of the bankrupt and carry them out, but that is because §2 (5) authorizes

him so to do. The trustee may, *if so ordered by the court* be substituted for the bankrupt either as a party paintiff or defendant in any litigation pending at the time of the bankruptcy, but that is because it is so provided by §11. The trustee can, with certain specified exceptions, bring or prosecute an action only in the same court where the bankrupt might have brought or prosecuted the same action, but this is so because §23 so provides. We thus see that the trustee "stands in the shoes of the bankrupt" in many respects, but this is true only because the Bankruptcy Act so provides for that state of affairs. When it comes, however, to a claimant prosecuting a claim against the bankrupt, the Bankruptcy Act specifically provides courts (i. e. the courts of bankruptcy) for such a proceeding, specifically provides that the trustee shall, against any such claim, assert in the court of bankruptcy any set-off that the bankrupt might have had against the claimant and then provides that arbitration may be had *but only under conditions specifically set forth in the act.*

That the jurisdiction of the Bankruptcy Court to adjudicate upon a claim asserted against a bankrupt is exclusive has been held in no uncertain terms by the Supreme Court of the United States. In *U. S. F. & G. Co. v. Bray,* 225 U. S. 205; 56 L. Ed. 1055, it appears that the court of bankruptcy had given *express leave* that the adjudication upon a claim should be had in a suit to be instituted in

a United States Circuit Court, but the Supreme Court said:

> "An examination of the bill discloses that its primary purpose is to obtain an adjudication of certain claims presented against the estate of the bankrupt, now in the course of administration in the bankruptcy court, and of the priority to be accorded to them in the distribution of a fund belonging to the estate and now in the control of that court. That this fund arose in the due administration of a fund belonging to the estate, is lawfully in the custody of the bankruptcy court, and is awaiting distribution among such of the creditors as are entitled to participate therein, is a necessary conclusion from the allegations of the bill, and is conceded. The complainant does not assert a title to it, but at most only an equitable right to have it applied to just claims for labor and materials, for which the complainant is liable as the bankrupt's surety under the act of August 13, 1894, supra. The real controversy is over the merits of some of those claims, the right of the present holders to assert them for their full amount, and the priority to be accorded them in the distribution. By an intervening petition in the bankruptcy proceeding the complainant voluntarily submitted its asserted equitable right to the court of bankruptcy for determination, and the matter is now pending before the referee. But by the present plenary bill in equity it is sought to take from the bankruptcy court the adjudication of the claims in question and the decision of what

priority shall be accorded them. The circuit court of appeals holds that this cannot be done consistently with the bankruptcy act, and the correctness of its holding is the principal question presented by this appeal. * * *

"A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks.

"Of the fact that the suit was begun in the circuit court with the express leave of the court of bankruptcy it suffices to say that the latter was not at liberty to surrender the exclusive control over matters of administration, or to confide them to another tribunal."

We thus see that the jurisdiction of the bankruptcy court to adjudicate upon claims against the bankrupt is exclusive. If, as was determined in the case last above cited, the bankruptcy court could not remit the adjudication of a claim to another federal court to be there adjudicated sub-

ject to the appellate jurisdiction of the same court as it would have been subject to if it had remained in the bankruptcy court, how much clearer must it be that a trustee in bankruptcy, without any authority whatsoever from the court, has no power to submit a matter involving a question of law to the arbitration of three individuals who are not lawyers, their decision to be absolutely binding both as to law and fact, without any power in either the bankruptcy court or any appellate court to correct whatever error of fact or law they might commit.

There are absolutely no authorities arising directly out of arbitration cases either for or against the power of a trustee in bankruptcy to submit a question to arbitration without first complying with §26 of the Bankruptcy Act or Rule 33 of the Bankruptcy Rules, but undoubtedly this is so for the simple reason that such a case has never arisen. Ordinarily, a trustee looks upon the Bankruptcy Act and the Bankruptcy Rules as his code of procedure and attempts to comply therewith, and this appears to be the first attempt of this nature made by a trustee in bankruptcy.

Various other cases, however, may be found where other public or quasi-public officials have attempted to submit questions to arbitration without first determining whether they were authorized so to do and the universal decision is that, in the ab-

sence of specific authority, an official has no power to submit a question to arbitrators or to arbitration.

In *District of Columbia v. Bailey,* 171 U. S. 161; 43 L. Ed. 118, the commissioners of the District of Columbia submitted a claim in issue with a contractor to the award of an arbitrator, and on the question of whether the award was valid, the Supreme Court said:

> "The general rule is, 'that everyone who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil incapacity of contracting.' *Kyd,* p. 35; *Russel, Arbitrators,* p. 14. And Morse, in the opening paragraph of his treatise on Arbitration and Award (p. 3), says: 'A submission is a contract.' And again, at p. 50: 'The submission is the agreement of the parties to refer. It is therefore a contract, and will in general be governed by the law concerning contracts.' In *Witcher v. Witcher,* 49 N. H. 176, the Supreme Court of New Hampshire said (p. 180): 'A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others and be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed.' It was because a submission to arbitration had the force of a contract, that at common law a submission by a corporation aggregate was required to be the act of the corporate body (Russell, Arbitrators, 5th ed. p.

> 20): which act was of necessity required to be evidenced in a particular manner."

After reviewing the various provisions of the statute relating to the powers of the commissioners, the court said:

> "There is no authority for holding that a mere administrative officer of a municipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation speaking through its municipal legislative body, to bind the corporation by a common law submission."

In *Van Slooten v. Dodge*, 39 N. E. 950, (N .Y.) it appeared that the respondent, Van Slooten, had presented a claim against the executor of an estate for the value of a diamond ring which she alleged the executor was wrongfully detaining from her on the ground that it was an asset of the estate. The executor had disputed the validity of the claim and thereupon a reference had been consented to and ordered pursuant to a statute of the state of New York which provides for such a reference to determine validity of claims against the deceased. The referee had reported in favor of the claimant, but the court of appeals, however, held that inasmuch as this was not a claim that existed at the time of the death of the deceased it did not come within the statute and therefore the reference was a nullity, saying:

> "The executor could not, by offering to refer the claim, waive the essential prerequisite

> of the statute that the claim must have been one against the deceased, which had accrued in his life, or which would have accrued against him, had he lived."

The same sort of a question came up again in *Shorter v. Mackey,* 43 N. Y. Suppl. 112, and the court there held that the parties were not estopped by having submitted to reference from claiming that the reference was void.

The same question again came up in *In re Mudge,* 118 N. Y. Supp. 568, and the court then said:

> "Even if both parties consent, jurisdiction would not be conferred to refer, if later either party objected."

In *Plum Bayou Levee Dist. v. Harper,* 116 S. W. 196 (Ark.), the president of a levee district had agreed to arbitrate a question of damages with a property owner. The arbitration was duly had and the property owner brought suit upon the award but the court said:

> "This appeal raises the question as to whether the president, in the absence of authority given him by the board of directors of the levee district, can make an agreement with a landowner for the amount of damages suffered by him for lands appropriated by the levee district for use in building its levee; for, if the power did not exist in the president to make such a contract, it follows that he had no authority to enter into an arbitration. The act

> itself prescribes the duties of the president, and no such authority is given him by the terms of the act. That power is placed in the board of directors. The facts in this case are undisputed, and the record does not disclose that the board of directors delegated to the president the authority to act in respect to the matter in question."

We thus see that, in the absence of statutory authority, a statutory official has no power to submit a question regarding his trust to arbitration.

Some claim is made by the respondents that this arbitration was a "substantial" compliance with §26 of the Bankruptcy Act and Rule 33, but a comparison with what was done in this matter with the provisions of these sections but leads one to the conviction that such is not the case. Section 26 (a) provides that the submission shall be "pursuant to the direction of the court." It is not claimed that there ever was any formal order entered by any court or any judicial officer whatsoever authorizing this arbitration. The most that can be claimed was that Cicero R. Hawkins, who was the referee to whom this bankruptcy had been referred generally, was the same individual as the Cicero R. Hawkins who, as special master, refused to proceed with the hearings upon the claim of the Commonwealth of Australia until something purporting to be an award by arbitrators was filed with him. Cicero R. Hawkins as special master had no jurisdiction to authorize an arbitration, for his

sole power as set forth in the order appointing him was to "take evidence and make findings * * * and to submit his findings and conclusions" to the court. Cicero R. Hawkins as referee had no jurisdiction to authorize an arbitration for the reason that Judge Neterer, when he made the order of October 12, 1920, setting up a special tribunal to adjudicate upon this claim, took away from the referee all power over the adjudication upon this claim, as he was duly authorized to do under §22 (a) of the Bankruptcy Act, under which a judge may directly cause the trustee to proceed with the administration of the estate or refer it generally to the referee "or specially with only limited authority to act in the premises or to consider and report upon specified issues." The order of Judge Neterer, entered upon October 12th, 1920, took from Cicero R. Hawkins, sitting as referee, all power over the adjudication upon this claim and necessarily all matters connected therewith, and did not vest in Cicero R. Hawkins, sitting as special master, any power to authorize the submission of any question connected therewith to arbitration. By this order, Judge Neterer assumed control over the adjudication of this claim and set up a special tribunal to hear it, and the referee, special master and the parties all combined had absolutely no power to erect any special court to try any issues connected with the matter except by the consent of the judge, evidenced by a formal modification of

his order. Furthermore, §26 clearly contemplated the framing of distinct issues of *fact* upon which arbitrators can make findings of fact which "shall have like force and effect as a verdict of a jury." There is no claim that any definite issues of fact were ever presented to these arbitrators. The utmost that is claimed is that these three arbitrators were appointed, there was much wrangling before them and they finally filed what purported to be an award.

Furthermore, there is not the slightest pretense of any compliance with Rule 33 of the Bankruptcy Rules. If this arbitration is to be upheld it can only be upheld upon the theory that the Bankruptcy Rules are only scraps of paper. This however is not the law as laid down by this court. In the case of *In re Gerber*, 186 Fed. 693, a referee in his desire to work out what he considered substantial justice, proceeded to disregard certain of the bankruptcy rules, but upon petition to this court for revision, this court said: "The rules and forms so prescribed by the Supreme Court under and by virtue of the Bankruptcy Act have the force and effect of law." Again, in *Sabin v. Blake-McFall Co.*, 223 Fed. 501, petitioning creditors failed to verify their petition in the form set forth in the general orders in bankruptcy. The District Court denied a motion to dismiss on this account, but this court said:

"We take advantage of this petition to revise, to impress upon counsel in bankruptcy proceedings the necessity and importance of closely scrutinizing and following the provisions of the bankruptcy act in the preparation of petitions, and, indeed, in the preparation of all papers connected with such proceedings. Definite, prescribed forms and methods of procedure in bankruptcy have been promulgated by the act, and also by the Supreme Court pursuant thereto. These forms and methods of procedure are especially adapted to the purposes sought to be accomplished by the act and they are in the main free from ambiguity and easily comprehended. To ignore them and trust to whatever form of statement may occur to the pleader is to invite criticism and objection from opposing counsel and to materially add to the expense of the proceeding and to the labors of the lower and appellate courts. If the provisions of the bankruptcy act are followed and the forms adhered to, proceedings in bankruptcy may be made inexpensive, and the questions involved may receive, at the hands of the courts, the immediate attention and the prompt disposition and determination which the framers of the act sought to accomplish."

This court thereupon stated that the petitioning creditors had 10 days to comply with the Bankruptcy Rules which they had disregarded under the penalty of having their petition dismissed.

It doubtless is the fact in this particular instance that all other creditors are very well satis-

fied with this arbitration, and, by reason of a very friendly feeling towards the arbitrators on account of their favorable decision, have not the slightest desire to contest the validity of this arbitration, but a rule of law is to be established in this case. If a trustee, who in this particular case was definitely opposed to the approval of the claim of the Australian Government, may without the knowledge or consent of the other creditors, indulge in arbitration, another trustee in another case who is favorable towards the approval of a doubtful claim can also indulge in arbitration without the knowledge or consent of the other creditors. He may proceed to appoint an arbitrator who is supposed to represent the opposition to the claim, but is really honestly favorable to it. It is possible that an arbitration agreement may be made under which the arbitration may be had behind closed doors without any definite issues to be determined and without the making of any record of the proceedings and the award so entered shall be final and unappealable. If this is in accordance with the bankruptcy law, the holder of a doubtful claim who has succeeded in obtaining the election of a trustee favorable (or at least not definitely unfavorable) to himself, has a very ready and efficient method of procedure to obtain a favorable action upon his claim which no other creditor can overturn. But the Bankruptcy Act does not intrust any such power to the trustee. Even the referee or the judge of the district court

has no power to approve a claim so finally that the matter can not be reopened and the claim re-examined, if a creditor can show good cause. A creditor may even appeal from an order approv-ing a claim if the trustee refuses so to do and good cause is shown, but if the trustee may without any order of the court submit a controversy to a general arbitration, it is within the power of a creditor holding a doubtful claim, to obtain an approval of such doubtful claim without the slightest chance of any other credtior being able to obtain the re-examination of such claim.

We respectfully submit that the action of the trustee in employing these arbitrators without making any attempt to comply with Section 26 of the Bankruptcy Act or with Rule 33 of the Bankruptcy Rules was in direct defiance of the letter and spirit of this act and these rules, and that upholding him in such procedure must necessarily lay down a rule of law which would form an available basis for collusion between a creditor and trustee for the purpose of obtaining an absolutely unappealable approval of a doubtful claim and therefore should not be allowed to stand.

We would respectfully submit that the order of the District Court should be reversed with instructions to deny the claim of these arbitrators for their fees.

Respectfully submitted,

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